Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

(7) (7)

Nos. 90-1126, 90-1435 Consolidated

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA J. NORMAN, *et al.*,

Petitioners,

vs.

DOROTHY REED, *et al.*,

Respondents.

COOK COUNTY OFFICERS ELECTORAL BOARD, *et al.*,

Petitioners,

vs.

DOROTHY REED, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM T. BARKER
(Counsel of Record)
GERALD E. FRADIN
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

HARVEY M. GROSSMAN
Roger Baldwin Foundation of ACLU, Inc.
20 East Jackson Boulevard
Suite 1600
Chicago, Illinois 60604
(312) 427-7330

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ARTHUR N. EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Attorneys for Amicus Curiae

Merrill Corporation • Chicago • 312-930-2700

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INTEREST OF THE AMICI

The American Civil Liberties Union (ACLU) is a national organization with nearly 300,000 members. The American Civil Liberties Union of Illinois (ACLU of Illinois) is the Illinois affiliate of the ACLU. The ACLU and its affiliates have been traditionally devoted to the protection and enhancement of fundamental liberties and basic civil rights.

Within a representative democracy, no right is more fundamental than the "equal right to vote." *Evans v. Cornman*, 398 U.S. 419, 426 (1970). Accordingly, this Court has repeatedly recognized the importance of rights of electoral participation and political association.

The instant controversy, involving the constitutionality of Illinois' procedures for creation and expansion of local political parties, deeply implicates these important political and associational interests. Indeed, it is the position of *amici* that Illinois' procedures impermissibly abridge these fundamental rights of political expression and association. *Amici* respectfully submit this brief to advance their position to this Court.

STATEMENT OF FACTS

Officials of Cook County, Illinois are elected from three constituencies. Some, including the President of the County Board, the State's Attorney, the Sheriff, and the County Clerk are elected from the county as a whole. Members of the County Board have been elected from two districts, one constituting the portion of the county within the City of Chicago ("City District") and one constituting the portion of the county outside that city ("Suburban District").[1] Ill.

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[1] The City of Chicago is not entirely contained within Cook County. The territory of the City includes O'Hare International Airport, and a portion of the Airport lies in DuPage County.

Const., Transition Schedule§ 5(b). The two districts have disparate populations,[2] so that in 1990 the more populous City District elected ten members at large and the Suburban District elected seven members at large.[3] *See Sutton v. Dunne*, 681 F.2d 484 (7th Cir. 1982) *cert. denied*, 460 U.S. 1081 (1983) (reapportioning Board members).

Illinois law provides two ways in which political parties may place before the electorate candidates for these offices. If one or more of a party's candidates for statewide office at the last general election for such offices polled more than 5% of the entire vote cast for that office, the party is an "'established political party' as to the state *and* as to any district or political subdivision thereof." Election Code, § 10-2, Ill. Rev. Stat. Ch. 46, § 10-2 (1989) (emphasis added).[4] A political party which is not established statewide may still be established in a particular subdivision, such as Cook County, if one or more of its candidates in that subdivision at the most recent election received more than 5% of the total votes cast for the offices sought.

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[2] At the 1980 Census, the population of the City of Chicago was 3,005,072 and the population of Cook County was 5,253,628. State & Metropolitan Area Data Book, 82, 400 (U.S. Government Printing Office 1986). Thus, the population of suburban Cook County was roughly 2,250,000. In 1986, the last election for the County Board prior to 1990, there were 1,476,370 votes cast, 841,085 in the City District and 635,285 in the Suburban District. Brief of Respondents Dorothy Reed, Valerie A. Sutton, Patton L. Fletcher, Ervin S. Ricks, and David Barrera in Opposition ("Br. In Opp.") 7. (The Petition for Writ of Certiorari in No. 90-1126 will be referred to as "HWP Pet." and that in No. 90-1435 will be referred to as "Board Pet.")

[3] At the November 1990 election, voters approved a binding referendum providing for election of all members of the County Board from 17 single-member districts. The first election of that sort will be in 1994.

[4] The Election Code is contained entirely within Chapter 46 of the Illinois Revised Statutes, and the section numbers therein are identical to the Code's own section numbers. Accordingly, no further parallel cites to the Illinois Revised Statutes will be given.

Id. Established political parties nominate candidates in primary elections and the names and party designations of those nominees then appear on the general election ballot. *Id.* § 7-1 *et. seq.* Parties which are not established are designated minor parties and must nominate candidates by petition. *Id.* § § 10-1 *et seq.*

In 1990, there were three parties established statewide: the Democratic Party, the Republican Party, and the Solidarity Party.[5] No other political parties were established in Cook County. In addition to the three statewide parties, the Harold Washington Party ("HWP") was established in the City of Chicago. (HWP Pet. 6.) However, the status of the HWP in Chicago did not entitle it to nominate candidates for Cook County offices, even those elected from the City District.

A minor party seeking to nominate candidates by petition must set forth "a complete list of candidates of such party for all offices to be filled in the . . . . political subdivision at the next ensuing election." Election Code § 10-2. As interpreted by the Illinois Supreme Court in this case, this provision requires a party seeking to present *any* candidates to the voters of Cook County to nominate candidates for *all* of the countywide positions and *all* positions on the County

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[5] The Solidarity Party was formed in 1986 when Adlai Stevenson III was nominated for Governor by the Democratic Party and found the candidates nominated for Lieutenant Governor and Secretary of State unacceptable running mates. By the time of the primary election, it was no longer possible to qualify for the ballot as an independent candidate, so formation of a new political party was necessary to run without associating with the unacceptable candidates. *See Stevenson v. State Board of Elections*, 638 F. Supp. 547 (N.D. Ill. 1986), *aff'd* 794 F.2d 1176 (7th Cir. 1986). A subsequent effort to merge the Solidarity Party into the Democratic Party was vetoed by Governor James Thompson, the candidate who defeated Stevenson. *Solidarity Party Gets A Reprieve: Thompson's Veto Action Will Let It Die A Natural Death*, Chicago Tribune, Sept. 25, 1987, at 24. Thus, although now abandoned by its founders, the Solidarity Party has continued to hold primary elections and will continue to do so as long as the occasional nominees receive the necessary votes. There is a dispute as to whether the votes received at the 1990 election were sufficient to allow that party to remain established. The Attorney General of Illinois has opined that it did not receive sufficient votes.

Board, both from the City District and from the Suburban District. (Board Pet. App. 4a.)

Because Cook County is "a political subdivision in which officers are to be elected from districts and at-large," the nominating petition is required "to consist of separate components for each district from which an officer is to be elected." *Id.* Thus, a petition to nominate minor party candidates in Cook County was required to contain three components: one for the county at large, one for the City District, and one for the Suburban District.[6]

Formation of a new political party for the entire state requires signatures of "1% of the number of voters who voted at the next preceding statewide general election or 25,000 qualified voters, whichever is less." *Id.* To form a new party in a political subdivision of the State, a nominating petition must be

> signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding regular election . . . However, whenever the minimum signature requirement for a district or political subdivision new political party petition shall exceed the minimum number of signatures for Statewide new political party petitions at the next preceding Statewide general election, such Statewide petition signature requirement shall be the minimum for such district or political subdivision new political party petition.

Id.

Based on the votes cast in the 1986 election, 5% of the votes cast would have been 73,818 for Cook County as a whole; 42,054 for the City District; and 31,764 for the Suburban District. However, because the statewide minimum was limited to 25,000, that number

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[6] In 1994, 18 components will be required, one at-large and one in each of the 17 County Board Districts.

would also suffice for each component of the petition. But the two districts are mutually exclusive, so the requirement of 25,000 signatures on each component means that the entire petition must contain at least 50,000 signatures, double the number required for a statewide petition.[7]

Nominating petitions for minor party candidates are required to specify the name of the party represented by the candidates. "However, such party shall not bear the same name as, nor include the name of any established political party." Election Code § 10-5.2. There is no provision whereby a party established in one political subdivision, such as the City of Chicago, may nominate candidates under its own name or authorize an affiliated group to nominate candidates under that name in another political subdivision, such as Cook County.

At issue in this case is a duly filed petition seeking to nominate petitioners Barbara Norman, *et al.* ("HWP Candidates") as candidates of the HWP for the various offices of Cook County to be elected at the November, 1990 election. Those petitions bore roughly 44,000 signatures from the City District and roughly 7,800 from the County District. (Board Pet. App. 46a). The HWP was formed by those unhappy with what they felt was inadequate responsiveness of the Chicago and Cook County Democratic Party to the concerns of the African-American community. (HWP Pet. 6.)

Objections to the petitions were filed by Respondents Dorothy Reed, Valerie A. Sutton, Patton L. Fletcher, Ervin S. Ricks, and David Barrera ("Objectors"). (J.A. 6.) So far as pertinent here, Objectors challenged (1) the failure of the petition to contain sufficient signatures on its Suburban District component and (2) use of the HWP name. (J.A. 6.)

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[7] In 1994, with the establishment of single-member County Board Districts, the total required would be 5% of the total vote in the 1990 election. Had that system been in effect in 1990, it would have required a total of 73,818 signatures, almost triple the requirement for a statewide petition.

The sole evidence on use of the HWP name indicated that the nominations were made on behalf of an affiliate of the established HWP and with the consent of Tim Evans, the sole candidate of the established HWP and the person authorized by State law to appoint party committees pending their election in the 1992 primary. (Board Pet. App. 40a.)

The Cook County Officers Electoral Board ruled that the HWP candidates were entitled to use the HWP name. (Board Pet. App. 41a.) Because the Suburban District component had insufficient signatures, it ruled that the Suburban District Candidates could not appear on the ballot. (Board Pet. App. 48a.) But because the at-large component and the City District component did have sufficient signatures, it ruled that the other HWP candidates could appear on the ballot for the at-large and City District offices. (Board Pet. App. 47a-48a.)

The Objectors appealed, and the Circuit Court of Cook County ruled that none of the HWP candidates could appear on the ballot. (Board Pet. App. 22a-24a.) It ruled that the lack of sufficient signatures on the Suburban District component was fatal to the remaining components of the petition. (Board Pet. App. 23a-24a.) That order was stayed by the Illinois Appellate Court, thus leaving the Electoral Board order in effect. (J.A. 116.)

The Illinois Supreme Court, granted direct review and, on a 4-3 vote, affirmed. (Board Pet. App. 2a-5a.) The majority ruled that use of the HWP name violated § 10.5 of the Election Code and that failure to file sufficient signatures on the Suburban District component was fatal to the entire petition. (Board Pet. App. 4a.) The stay previously entered was vacated. (Board Pet. App. 4a.)

This Court stayed the Illinois Supreme Court's order, thus leaving the Electoral Board order in effect. (J.A. 118.) The HWP candidates appeared on the ballot, and one of them received 15.4% of the votes cast for the office she sought. Official Canvas of the Votes

Cast at the November 6, 1990 General Election (Cook County Clerk 1990). Thus, if the HWP was entitled to appear on the ballot, it has become an established political party in Cook County, entitled to nominate candidates at the next election.

INTRODUCTION AND SUMMARY OF ARGUMENT

Representative democracy rests upon the "consent of the governed" and this "consent" is, in turn, obtained by permitting the people to freely and fairly choose their political leaders. Alexander Hamilton observed that the essence of representative government is "that the people should choose whom they please to govern them." 2 *Elliot's Debates* 257.

This unexceptional proposition was also explored by Chief Justice Warren who noted that representative democracy "is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell v. McCormack*, 395 U.S. 486, 547 (1969). Accordingly, our contemporary claim of commitment to democratic government has a hollow ring when we design laws that fail to confer upon our citizens the widest possible freedom to choose among the candidates seeking public office.

"[A] voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). "This does not mean every voter can be assured that a candidate to his liking will be on the ballot," but a state may not discriminatorily obstruct the ability of like-minded citizens to put their candidates before the electorate. *Id.*

If minor parties are unduly limited in their access to the ballot, the voters are left without adequate alternatives to what they may find to be unsatisfactory offerings of the major parties. But the significance of ballot access is not measured solely by the ability of minor party nominees to be elected, for that would ignore

> the significant role that third parties have played in the political development of the Nation. Abolitionists,

> Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 185-86 (1979) (citations omitted); *Anderson v. Celebrezze*, 460 U.S. 780, 787-88, 794 (1983).

Minor parties also serve, as the HWP may do, as an alternative means of political expression for constituencies dissatisfied with a party to which they have previously adhered. If a constituency is large enough or the new party forms coalitions with other voters, the new party may itself become a major force. The renewed need of the old party to compete for once-reliable adherents also may alter the positions of that party, thus improving the lot of the formerly dissatisfied group. The new party may instead alert another major party to an electoral opportunity, thereby facilitating a transfer of allegiance in return for greater attention to the constituency which the new party sought to represent. For all of these reasons, the ability to associate by forming or expanding new parties is of fundamental importance to all citizens and is a significant factor in the democratic dynamic which keeps government and the political system accountable to the electorate.

A state may not broadly stifle this process by unduly burdening or restricting the formation of new political parties. Even less may it skew the process by granting some voters greater weight than others or by making it easier for some groups to form new parties than for other groups which are similarly situated with respect to the electoral process. Illinois has done both of these forbidden things. It has given greater weight to suburban voters by requiring equal numbers of signatures from the City District and the Suburban District, even though the latter is significantly less populous. Illinois has also preferred groups with substantial followings in both districts over

more geographically concentrated and insular groups, such as the Cook County African-American community, which is predominantly located in the City District.

The second of these impermissible effects stems from the combination of two rules that, were each taken alone, might well be unobjectionable. One is the requirement that a new party show a modicum of support in *each district* where it nominates candidates rather than accepting such a showing for the *entire subdivision* of which the districts are a part. The other is the requirement that a new party nominate candidates for *all* positions in *all* districts. If Illinois accepted an overall showing of support for the entire County, then the requirement to run candidates in all districts would not obstruct access to the ballot. Conversely, if Illinois permitted a new party to run candidates only at large and in those districts where they could show the requisite support, then the requirement of a district-by-district showing of support would not exclude any candidates who could play a meaningful role in their respective elections. But the *combination* of the two requirements greatly restricts ballot access by geographically concentrated groups, so that combination is forbidden even if each requirement alone would be valid.

Illinois has also directly restricted the ability of parties which have attained a foothold in one political unit to associate with allies or adherents desiring to seek office in another political unit under the banner of the fledgling party. It has disallowed ballot placement for candidates using the name of a party already established in a different political subdivision. Illinois forbids this even though the established party makes no objection to such use of its name and even though that party describes the petitioning organization in the other subdivision as an affiliate. Such an absolute prohibition is impermissible.

Even if Illinois might have prescribed specific procedures to be followed in establishing such affiliations, it may not do so by retroactively placing a stringent and unpredictable restrictive interpretation on an ambiguous statute and then penalizing those who acted before the procedures were defined for failure to correctly

forecast and comply with the not-yet-promulgated requirements. Since Illinois has yet to prescribe *any* procedure for affiliation among local political parties, it may not penalize the HWP candidates for acting on the basis of an informal affiliation.

ARGUMENT

There is no question here as to the HWP candidates' "preliminary showing of a significant modicum of support" in the constituencies from which they sought to be elected. *Jeness v. Fortson*, 403 U.S. 431, 442 (1971). The HWP candidates had more than 44,000 signatures on their City District component and over 50,000 signatures on their at-large component.[8] Illinois requires no more than 25,000 signatures for any constituency, up to and including the entire State.

By requiring *both* a full slate and 25,000 signatures on *each* component, Illinois has effectively required of Cook County parties double the number of signatures required for parties seeking to make nominations for statewide office, with no reason of any sort, let alone a compelling reason, for doing so. This fact alone shows a violation of the constitutional requirement expounded in *Illinois State Board of Elections v. Socialists Workers Party*, 440 U.S. 173 (1979) (because 25,000 signatures adequate for statewide candidacy, larger requirement for City of Chicago and Cook County unconstitutional). While that violation alone would require reversal of the judgment below, the HWP candidates surmounted even this unconstitutional hurdle: they obtained more than 50,000 signatures on their petition.

Nonetheless, the HWP was disqualified from the ballot on two grounds. Because it lacked sufficient demonstrated support in the Suburban District, it was not permitted to run candidates countywide or in the City District, despite its ample support in each of those

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[8] The HWP candidates had only 7,800 signatures on their Suburban District component, but they do not here challenge exclusion of the suburban candidates from the ballot.

constituencies. Moreover, because the HWP was already established in the City of Chicago, candidates were forbidden to run under its banner for Cook County office. Neither ground can withstand constitutional scrutiny.

I. THE REQUIREMENT THAT A PARTY MUST HAVE SUPPORT IN *ALL* DISTRICTS OF A SUBDIVISION BEFORE IT MAY RUN CANDIDATES IN *ANY* PORTION OF THE SUBDIVISION UNCONSTITUTIONALLY INFRINGES THE RIGHT OF POLITICAL ASSOCIATION, ESPECIALLY WHERE THE DISTRICTS ARE OF UNEQUAL POPULATION.

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986).

In a representative democracy, "the voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). "[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." *Kusper v. Pontikes*, 414 U.S. at 58. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Moreover, "limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political

effectiveness as a group" can "threaten to reduce diversity and competition in the marketplace of ideas." *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

Thus, it is well settled that restrictions on access to the ballot burden both "the rights of individuals to associate for the advancement of political belief, and the right of qualified voters, regardless of political persuasion, to cast their votes effectively." *Id.* at 787. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). And the right to vote is "heavily burdened if that vote may be cast only for one of two [or three] parties at a time when other parties are clamoring for a place on the ballot." *Williams v. Rhodes*, 393 U.S. at 31. Thus, "[i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989) (citations omitted).

Exacting scrutiny is particularly necessary here for two additional reasons. First, the Illinois scheme grants unequal power to those voters residing in the Suburban District as opposed to those residing in the City District. Second, Illinois gives preference among political parties to those whose members are relatively equally divided between the two districts and disadvantages parties of equal size whose members are more concentrated in one district rather than the other.

A. By Requiring Equal Numbers of Signatures From Districts of Substantially Disparate Population, Illinois Violates the Requirement of Voter Equality in Selection of Representatives.

Voter equality is one of the most fundamental precepts of our representative form of government.

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.

Gray v. Sanders, 372 U.S. 368, 379 (1963).

The seminal application of that principle to the ballot access process came in *Moore v. Ogilvie*, 394 U.S. 814 (1969). For independent candidates for statewide office, Illinois required filing 25,000 signatures, including at least 200 from each of at least 50 counties. At the time, 93.4% of the State's registered voters resided in the 49 most populous counties and only 6.6% resided in the remaining 53 counties. This Court found the distributional requirement inconsistent with the constitutional requirement of voter equality, pointing out that:

> [I]t is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.

Id. at 818-19.

The Court illustrated the forbidden discriminatory impact as follows:

> Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

Id. at 819.

Illinois then sought to replace this law by retaining the requirement of 25,000 signatures and limiting to 13,000 the number which could be counted from a single county. The Seventh Circuit struck down that version as conferring a similar discriminatory veto power:

> Under section 10-2 the entire electorate of Cook County, which represents 45% of all registered voters in Illinois, may not form a new political party and place its candidates on the ballot. Yet any 25,000 of the remaining 55% of registered voters properly distributed among the remaining 101 counties may form a new party to elect candidates to office. Put another way, the approximately 2,750,000 registered Illinois voters in urbanized Cook County do not have the power under section 10-2 to create a statewide political party to protect their own peculiar interests, while 25,000 voters in any two or more counties in rural downstate Illinois may create such a party to protect their distinctly different, and often competing interests. This two-county requirement, like the fifty county requirement in *Moore*, "discriminates against

> the residents of the populous counties of the state in favor of rural sections."

Communist Party v. State Board of Elections, 518 F.2d 517, 521 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975).[9]

This conclusion is confirmed by the explanation of *Moore v. Ogilvie* in *Buckley v. Valeo*, 424 U.S. 1 (1976). There this Court upheld a system of matching funds for major party presidential candidates requiring raising of specified funds in at least 20 states. Reliance was placed on the unique and special need for dispersed geographic support created by the presidential election system: "A president is not elected by popular vote, but by winning the popular vote in enough states to have a majority in the Electoral College." *Id.* at 106. *Moore* was distinguished on the ground that:

> Only 7% of Illinois voters could have blocked a candidate from qualifying for the ballot, even though the statewide elections were decided by straight majority vote. The clear purpose was to keep any person from being nominated without support in downstate counties making up only 7% of the vote, but those same voters could not come close to defeating a candidate in the general election.

Id. at 144.

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[9] Since *Moore*, requirements of equal numbers of signatures from districts of substantially disparate population have consistently been declared unconstitutional. *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262, 1272 (S.D. Ohio 1970), *aff'd mem.*, 409 U.S. 942 (1972); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 990 (S.D.N.Y. 1970), *aff'd mem.*, 400 U.S. 806 (1970); *Bloomquist v. Thompson*, 739 F.2d 525, 527-28 (10th Cir. 1984); *Libertarian Party v. Beerman*, 598 F. Supp. 57, 62 (D. Neb. 1984); *Socialist Workers Party v. Hare*, 304 F. Supp. 534 (E.D. Mich. 1969); *but see Cavanaugh v. Schaeffer*, 65 Pa. Commw. 620, 444 A.2d 1308, 1310-11 (1982) (requirement of 100 signatures from each of five counties upheld because four most populous counties had only 41.8% of population and because case involved judicial election and judges were not considered "representatives").

That analysis is equally valid here. The Suburban District is 30% less populous than the City District, as shown by the Census figures and the apportionment of the County Board. Yet even though the residents of the City District have the votes, if united, to control all countywide offices and a majority on the County Board, the residents of the Suburban District have the power to prevent the formation of a political party to effectuate such control. Thus, there is a clear violation of *Moore v. Ogilvie*.

B. Illinois Also Grants an Improper Preference to Parties Whose Members Are Geographically Dispersed.

Even if the equality of individual voters is maintained, this Court has noted that

> It is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'"

Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (footnote omitted). That is, a state may not skew the political process so as to favor some identifiable viewpoints as opposed to others held by an equal number of voters.

This sort of forbidden loading of the political dice is also inherent in the statute at issue here. The combination of the full slate requirement with a requirement of a district-by-district showing of support limits ballot access to those parties with sufficient support in

all districts. This clearly favors groups which are roughly equally dispersed between the two districts. As such a group grows in numbers, the group will be able to meet the signature requirements in both districts at about the same time. But a group of equal size which is concentrated in one district would have a surplus of signatures in one district and a deficiency in the other, so that it would need to grow larger than a dispersed group to be equally able to qualify for the ballot. The more heavily concentrated the group, the greater the disparity in ability to qualify a party—to the point where a group entirely located in one district, no matter how large, could never qualify for the ballot.

Many identifiable interests in our society are concentrated geographically. For example, African-Americans, a group to which the HWP seeks to appeal, are concentrated in cities. On the other hand, European-Americans are much more evenly dispersed, at least in Cook County. Similarly, farmers are concentrated in rural areas, while other occupations may be more evenly dispersed throughout a state. A state may not structure the political process so as to prefer some groups to others in ways not corresponding to their ability to elect or defeat candidates once nominated. Thus, voters in one district cannot be given a veto power over candidates to be nominated in another district nor a veto power over the ability to nominate candidates at-large who possess the requisite modicum of support in the political subdivision as a whole.

Nor should it be dispositive that wider geographic support might be necessary to obtain a majority for an at-large position. By definition, new parties almost always will be at least third parties, so even a strong plurality might win an election. More importantly, as previously explained, the ability to field candidates can significantly advance the political interests of a new party's constituency even without ever winning an election. Consequently, no one group or identifiable class of groups may properly be given a preference over another group or class of groups in obtaining a position on the ballot.

Cases which have held otherwise have focused exclusively on the equality of power given to *individual* voters and failed to consider

how geographic distribution requirements disadvantage concentrated *groups* of voters.[10] Yet, by definition, the activities of political parties involve groups of voters and not just individuals, so equal treatment of equally numerous *parties* is a matter of constitutional concern. Thus, the results reached in those cases should not be deemed dispositive of the argument presented here, which does not appear to have been considered. Moreover, several of the cases approve only a requirement for signatures in half of the equal-population districts involved, so those cases do not support the requirement here of signatures in *all* districts.[11] Similarly, none of them permitted lack of

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[10] *Morritt v. Governor*, 42 N.Y.2d 347, 397 N.Y.S.2d 929, 366 N.E.2d 1285 (1977), *appeal dismissed for want of a substantial federal question*, 434 U.S. 1029 (1978) (requirement of 100 signatures from each of half the Congressional districts in the state to obtain position on primary ballot for statewide office); *Udall v. Bowen*, 419 F. Supp. 746 (S.D. Ind. 1976), *aff'd mem.*, 425 U.S. 947 (1976) (500 signatures from each Congressional district to place name on presidential preference primary ballot); *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985) (requirement signatures equal to 1% of vote in all Congressional districts or 2% in half of districts); *Johnson v. Cuomo*, 595 F. Supp. 1126 (N.D.N.Y. 1984) (same requirement as in *Morritt* for new political party presidential candidates); *Libertarian Party v. Davis*, 591 F. Supp. 1561 (E.D. Va. 1984), *aff'd* 766 F.2d 865 (4th Cir. 1985) *cert. denied*, 475 U.S. 1013 (1984) (200 signatures from each Congressional district for new party presidential candidates).

[11] Summary adjudications by this Court are not precedential as to more than "'the precise issues presented and necessarily decided. . . .' A summary disposition affirms only the judgment of the court below and no more may be read into [this Court's] action than was essential to sustain the judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983).

In this regard, it is significant that *Udall v. Bowen*, 419 F. Supp. 746 (S.D. Ind. 1976), aff'd mem., 425 U.S. 947 (1976), did not involve a candidate with geographically concentrated support but merely an inadvertent failure to make a timely filing of one component of the petition. Thus, the plaintiff there could not assert the rights of political parties, like the HWP, whose support is geographically concentrated. *See Rosario v. Rockefeller*, 410 U.S. 752, 757-58 (1973) (requirement of advance enrollment in party did not disenfranchise voter who could have enrolled in timely manner but failed to do so).

footnote continued on page 19

support in one district to prevent placement on the ballot of candidates in another district, when those candidates had ample support in the district where they proposed to run.

This Court should now consider the problem of discrimination against a geographically concentrated group and hold that this discrimination, as well as the improper enhancement of the power of the residents of the less populous Suburban District, violates the Fourteenth Amendment.

II. ILLINOIS HAS UNCONSTITUTIONALLY INFRINGED ON THE RIGHT OF THE HWP TO ASSOCIATE WITH THE HWP CANDIDATES FOR THE PURPOSE OF EXPANDING ITS ACTIVITIES INTO AN ADDITIONAL POLITICAL UNIT.

The HWP is an established political party in the City of Chicago. (HWP Pet. 6.) As such, it has an established constitutional right to associate with new and potential adherents for the purpose of seeking "political power in the community." *Tashjian v. Republican Party*, 479 U.S. 208, 216 (1986); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989). Moreover, this right includes "the freedom to identify the people who constitute the association."

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footnote continued from page 18

In *Moritt v. Governor*, 42 N.Y.2d 347, 397 N.Y.S. 2d 929, 366 N.E. 2d 1285 (1977), *appeal dismissed for want of a substantial federal question*, 434 U.S. 1029 (1978), the issue presented in this Court related solely to a claim of unequal weighting to the votes of those residing in different districts. While the districts were of equal population, the distribution requirement was applied to a candidacy in a party primary and party members were not equally distributed among districts. Thus, the claim was that the districts had disparate populations *of those eligible to participate in party affairs*, thus making *Moore v. Ogilvie* directly applicable. Jurisd. Stmt., No. 77-524, 8-13. Rejection of *that* claim does not require that distributional requirements be sustained against the different challenge presented here.

Tashjian, 479 U.S. at 214; *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). In *Tashjian*, the Court struck down a Connecticut law which required voters in any party primary to be registered members of that party *even though the party wished to permit independent voters to participate*. The Court found that because the statute limited the group of registered voters who could participate in the primary, the State impermissibly limited the party's "associational opportunities." 479 U.S. at 216.

The State of Illinois has similarly restricted the associational rights of both the established HWP and the petitioners who wish to participate in that party. This prohibition was imposed without regard to the shared desire of the HWP and the HWP candidates to associate with one another. Despite that desire, Illinois absolutely prohibited the use of the HWP name by the HWP candidates. On the record, the established HWP had no objection to the use of the HWP name by the HWP candidates. (Board Pet. App. 40a.) Both the HWP and the HWP candidates regard themselves as affiliated. Thus, as in *Tashjian*, there is no conflict between the associational interests of the party (the established HWP) and those whose participation the party encourages (the HWP candidates who seek to carry its banner). *Id.* at 216, n.7.

The interest asserted by Illinois is in preventing voter confusion. (Board Pet. App. 39a.) But there can be no confusion unless the two organizations claiming a single name are in fact independent of one another rather than being affiliates.[12] *Tashjian* teaches that while a state has a legitimate interest in preventing voter confusion, that interest does not make it permissible for the state to "act as the ideological guarantor" of the established party by ensuring that voters are not misled by a candidate whom the state views as not a "true" member of the party. *Id.* at 220. A state has no interest in limiting who a party can allow to operate under its name and in concert with it. The

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[12] It is not necessary that they be the same, any more than the Democratic Party of Cook County need be the same as the Democratic Party of DuPage County. It is enough that both groups regard themselves as being united in a common cause.

State of Illinois may have a legitimate concern in preventing two *different* parties with the same name from running candidates in different elections, but it cannot have a legitimate concern with whom a political party chooses to include among its members. As this Court has stated:

> The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

Id. at 224.

Nor can Illinois support its action by asserting that the HWP failed to follow the appropriate procedures to decide to affiliate with the HWP candidates. (See HWP Pet. App. 17 (ruling of the Circuit Court), 52-53 (dissenting opinion to Electoral Board decision)) To begin with, it was not at all clear that *any* action was necessary. Neither the Electoral Board nor the Circuit Court believed the prohibition on use of an established party name applied outside the political unit(s) in which that party was established. (Board Pet. App. 39a-40a, 20a-21a.) The Illinois Supreme Court has ruled that the Electoral Board and the Circuit Court misread the statute, but the HWP and HWP candidates could hardly be blamed for having shared that reading.

Moreover, even if the prohibition had been clear, there was (and is) no established procedure for an established party to authorize use of its name by aspirants to office in a different jurisdiction or to affiliate with such aspirants. Thus, if the HWP chose the wrong procedure, the cause lay largely in the failure of Illinois to prescribe a procedure (or even to indicate that consent or affiliation was possible).

Since the State has failed to make such a procedure available to the HWP, it cannot now attack the method by which the party has itself decided to expand. Moreover, the State certainly cannot create

such a procedure after the fact and make it applicable to petitioners. A restrictive interpretation of an election rule which compromises fundamental rights may not be imposed without "forewarning" those subject to the rule. *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970).

In *Briscoe*, voters and Chicago aldermanic candidates barred from ballots filed a civil rights action alleging that the election authorities violated their constitutional rights by rejecting signatures on nominating petitions for "highly technical reasons." *Id.* at 1051. The Seventh Circuit found that the authorities had employed a restrictive interpretation, contrary to its own past practice, of vague petition signature rules without any explanation or advance warning to candidates. The effect of this new interpretation was to "nullify previously acceptable signatures" at a time when petition circulators could no longer alter their circulating techniques. *Id.* at 1055. Because fundamental rights were implicated, "those interested require certain knowledge [at the time they act] of what is expected of them by the state." *Id.* The Seventh Circuit therefore held that "where there is no advance clarification or statement" of a rule, "the Constitution permits enforcement of the statutory rule in only the least restrictive and most obvious manner." *Id.* at 1056.[13] Application here, without any advance notice, of an ambiguous rule in an extremely restrictive way violates that principle.

Moreover, given the lack of specificity in the statute at issue combined with the complete absence of advance warning to petitioners regarding the nature of the Rule's application, the State cannot constitutionally justify the complete exclusion of the HWP candidates from the ballot. For even if the interpretation which prohibits

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[13] *See Griffin v. Burns*, 570 F.2d 1065, 1075-79 (1st Cir. 1978) (unconstitutional to retroactively apply new interpretation where effect would be to disenfranchise voters whose ballots were cast in accordance with prior practice); *Gartrell v. Knight*, 546 F. Supp. 449, 453-54 (N.D. Ala. 1982); *Williams v. Sclafani*, 444 F. Supp. 906, 911-12 (S.D.N.Y. 1978), *aff'd mem.*, 508 F.2d 1046 (2nd Cir. 1978).

the petitioners from using the HWP name can be viewed as reasonable, the harsh remedy of exclusion from the ballot cannot. Any voter confusion resulting from use of the HWP name could be eliminated simply by deleting that name from the ballot line on which the candidates would appear. *See Vasquez v. Municipal Officers Electoral Board*, 115 Ill. App. 3d 1014, 450 N.E. 2d 1379 (3rd Dist. 1983) (allowing candidates to appear but requiring omission of confusingly similar party name). Even if the objective is legitimate, the Constitution requires a state to accomplish that end narrowly and fairly so as to avoid obstructing and diluting these fundamental liberties. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

The State of Illinois seeks to place a wall around the established HWP without its consent and without any justification. By limiting whom the HWP can associate with, the State has violated the First and Fourteenth Amendments.

CONCLUSION

For all of the reasons stated above, the judgment of the Supreme Court of Illinois should be reversed and the Order of the Cook County Officers Electoral Board should be reinstated.

Respectfully submitted,

WILLIAM T. BARKER
(Counsel of Record)
GERALD E. FRADIN
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

HARVEY M. GROSSMAN
Roger Baldwin Foundation of ACLU, Inc.
20 East Jackson Boulevard
Suite 1600
Chicago, Illinois 60604
(312) 427-7330

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ARTHUR N. EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Attorneys for *Amici Curiae*